New Employment Laws for 2019

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Three sure signs that it's finally fall in California are those changing leaves, the pumpkin spice lattes and a stack of freshly signed bills on the governor's desk.

This year, 1,217 bills made it to the governor's desk and 1,016 of them were signed into law. Dozens will affect employers in 2019, but some won't have an impact until 2020 or 2021.

Many new laws stemmed from the #MeToo movement, affecting settlements and nondisclosure agreements in sexual harassment claims, and extending so-called "professional relationship harassment" liability.

On that same note, businesses large and small should read up on SB 1343. This new mandatory sexual harassment training law will apply to employers of five or more and require employers to provide training for both supervisors and nonsupervisory employees by January 1, 2020.

A positive change for employers is contained in the CalChamber-sponsored AB 2770, which will protect employers and sexual harassment victims from liability for defamation in which an alleged harasser might claim injury to his/her reputation.

Many of this year's new laws made small but important clarifying changes, such as AB 2282's updated guidance on last year's salary history ban and AB 1565's changes to the joint liability imposed on general contractors in the construction industry by AB 1701, signed by the governor in 2017.

California businesses also must pay attention to local ordinances and other upcoming changes for January 1, 2019, which will be covered in future editions of *HRCalifornia Extra*.

This issue of *HRCalifornia Extra* summarizes new state laws in the following categories:

- Leaves of Absence and Benefits
- Hiring Practices
- Discrimination, Harassment and Retaliation Protections
- Wage and Hour
- Workplace Health/Safety and Workers' Compensation
- Liability
- Human Trafficking Training

Although several new employment laws were passed, CalChamber successfully stopped a number of harmful labor-related proposals. Of note, Governor Edmund G. Brown Jr. vetoed AB 3080, the last CalChamber-identified job-killer bill of the 2017-2018 Legislative Session, which would have banned settlement agreements for labor and employment claims, as well as arbitration agreements made as a condition of employment. If passed, AB 3080 would have significantly expanded employment litigation, delayed resolution of claims and increased costs on employers.

For more information regarding CalChamber's advocacy efforts this legislative session, visit *CalChamber Alert*.

CalChamber's employment law experts will cover the new state laws in more detail on HRCalifornia and in the *2019 California Labor Law Digest*, and will make the necessary updates to all CalChamber products.

Leaves of Absence and Benefits

New laws were signed expanding the reasons employees can collect California's Paid Family Leave (PFL) benefits and changing which workplace areas employers can designate for lactation accommodation purposes.

Paid Family Leave

Beginning January 1, 2021, the PFL wage replacement program will be expanded. Under SB 1123, employees will be able to collect PFL benefits if they take time off for activities related to the covered active duty status of their spouse, registered domestic partner, child or parent who is a member of the U.S. Armed Forces. Called "qualifying exigencies," these activities might include such things as official military ceremonies; briefings; changes to child care or financial or legal arrangements as a result of military service; counseling; or spending time with the covered servicemember during rest and recuperation leave, among others. The term qualifying exigencies comes from the federal Family and Medical Leave Act (FMLA), which provides up to 12 weeks of protected leave for such situations.

This new law doesn't create a right to take a protected leave of absence, merely the ability to collect PFL benefits if the employee does take time off. The right to take a protected leave for "qualifying exigencies" will depend on whether the employee is eligible under the FMLA. If the employee is not, an employer could nonetheless choose to provide a leave for qualifying exigencies but would not be required to do so.

Paid Family Leave — Technical Correction

The seven-day waiting period for receiving PFL benefits was eliminated as of January 1, 2018. Prior to that change, if employers required an employee to take up to two weeks of earned but unused vacation before receiving PFL benefits, the employee could apply the vacation time to the seven-day waiting period.

An outdated sentence erroneously remained in the PFL code this year that incorrectly referenced the waiting period. AB 2587 simply erased that outdated reference.

Lactation Accommodation

Under current state law, an employer must provide a location other than a toilet stall for an employee to express breast milk. The location must be private and in close proximity to the employee's work area.

The CalChamber-supported AB 1976 brings California law into conformity with federal law on lactation accommodation by requiring that the employer provide a location other than a "bathroom," rather than a toilet stall. As a result, employers will not be able to assign a bathroom as a designated space for employees to express breast milk. The California Chamber of Commerce was instrumental in gaining a "hardship exemption" to this rule. This exemption allows an employer who can show it's an undue hardship to find a location other than a bathroom (due to the size, nature, or structure of the business) to make reasonable efforts to find a private and close location other than a toilet stall.

Hiring Practices

This year, the Legislature provided clarity about last year's salary history ban and tightened up the rules on considering sealed or expunged convictions when making hiring decisions.

Salary History

Last year's AB 168, which banned inquiries about salary history and required employers to provide pay scales to applicants upon request, contained some ambiguities that were addressed in this year's AB 2282. The Labor Code was amended to clarify that:

- Employers can ask about an applicant's *salary expectations* for the position being applied for;
- Only external applicants (not current employees) are entitled to a pay scale upon request, and only after completing an initial interview; and
- The pay scale provided only needs to include salary or hourly wage ranges.

In addition, compensation decisions based on a current employee's existing salary, such as for giving raises or bonuses, may be permissible if justified by factors such as a seniority or merit system.

Criminal Background Checks

Current law generally prohibits employers from considering judicially sealed or expunged convictions when conducting a criminal background check on a job applicant. However, employers hiring for certain sensitive positions cannot legally hire applicants with specific convictions, such as where a bank teller has a conviction related to a bank robbery, even if sealed or expunged. SB 1412 narrows an employer's ability to consider sealed or expunged convictions to only those circumstances where a particular conviction would legally prohibit someone from holding that job.

Discrimination, Harassment and Retaliation Protections

Several new laws focus on increasing employee protections for 2019. The Legislature expanded an employer's liability for harassment in numerous ways and added harassment education and training requirements. Additionally, a new law that requires female representation on boards of directors for certain California corporations was passed.

Harassment — Defamation Protection

Employers and victims of sexual harassment will now be better protected from liability for defamation by an alleged harasser after a complaint of sexual harassment has been made.

California's current Civil Code Section 47 protects certain communications as privileged, making them immune from defamation lawsuits. However, victims of sexual harassment and employers are being sued for defamation when a complaint of sexual harassment is made. AB 2770 codifies case law to ensure victims of sexual harassment and employers will not be sued for defamation by the alleged harasser. As a result:

- Employees who report harassment, based on credible evidence and without malice, won't be liable for injury to the alleged harasser's reputation.
- Communications between the employer and victims/witnesses will be protected;
- An employer will now be permitted to reveal in a job reference whether the individual is not eligible for rehire because the employer determined that he/she engaged in sexual harassment; and

Confidentiality Clauses in Settlement Agreements

The CalChamber-opposed SB 820 expands the types of cases in which so-called "secret settlements" are restricted. It prohibits any settlement agreement in a case where sexual harassment, assault or discrimination has been alleged from including a confidentiality provision that prohibits disclosure of factual information regarding the claim, except with regard to the claimant's identity.

Sexual Harassment

The CalChamber-opposed SB 1300 makes numerous changes to California's Fair Employment and Housing Act (FEHA) relating to workplace harassment claims. It prohibits an employer from requiring an employee, in exchange for a raise or bonus, or as a condition of employment or continued employment to:

- Agree not to sue or bring a claim against the employer under the FEHA; or
- Sign a non-disparagement agreement preventing the employee from disclosing information about unlawful acts in the workplace, including but not limited to sexual harassment.

These prohibitions don't apply to a negotiated settlement agreement. In a letter to the *Daily Journal* on August 31, 2018, the law's author also clarified that the prohibitions don't apply to severance agreements.

Additionally, SB 1300 expands employer liability for unlawful harassment by nonemployees and prohibits a prevailing defendant from being awarded attorney's fees and costs unless specific factors are proven. Under the new law, employers are permitted, but not required, to provide bystander intervention training.

Finally, the Legislature used SB 1300 as a vehicle to make a number of declarations, approvals and disapprovals of current legal standards and decisions related to sexual harassment claims. Keep in mind that the Legislature's declarations and expressions of intent, while codified, don't reflect a change in the related provisions of statutory law.

Through these declarations, the Legislature took it upon itself to state that a single act of harassing conduct is sufficient to create a "triable issue of hostile work environment," lowered the standard of proof for bringing a harassment claim and declared that the legal standard for sexual harassment claims should not vary by type of workplace. SB 1300 is a reflection of the Legislature's desire to make it increasingly difficult for employers to defend against workplace harassment claims.

Sexual Harassment Training

Current law requires employers with 50 or more employees to provide supervisors with two hours of sexual harassment training within six months of hire or promotion. Under SB 1343, by January 1, 2020, all employers with five or more employees will be required to provide two hours of sexual harassment training to supervisors and one hour to nonsupervisorial employees within six months of hire or promotion, and every two years after that. Employers who provide the training to employees in 2019 will not be required to retrain the same employees in 2020.

Temporary and seasonal employees must be trained within 30 days of hire or 100 hours worked, whichever is earlier. Temporary services employers will be responsible for training employees who are placed with clients.

Waivers of Right to Testify

Sweeping nondisclosure agreements in contracts or settlements often require individuals to maintain public silence, preventing them from offering relevant testimony in a public forum on a matter of public concern — but the Legislature addressed that concern this year by passing AB 3109.

Under this new law, any provision in a contract or settlement agreement will be unenforceable if it prohibits a party to the contract from testifying about criminal conduct or sexual harassment in an administrative, legislative or judicial proceeding. The CalChamber-supported AB 3109 covers only testimony that is required, such as by subpoena or court order, or in response to a written request in an administrative or legislative hearing.

Gender Representation on Boards of Directors

Any publicly held corporation with principal executive offices in California will now be required to place at least one female director on its board by December 31, 2019. A corporation may increase the number of directors on its board to comply. Depending on the board's size, up to three female members may be required by the end of 2021. Significant financial penalties apply if a company fails to achieve the required number of female directors.

In his signing letter for the CalChamber-opposed SB 826, Governor Brown noted that there have been "serious legal concerns" raised about its mandate. Such a quota likely violates the United States Constitution, California's Constitution, California's Civil Rights Act and the internal affairs doctrine, which places companies headquartered in California in a legal predicament.

Discrimination Against Servicemembers

Two new laws were passed this year to bring the terminology up to date in California laws protecting servicemembers.

Existing laws prohibit employment discrimination based on current, past or future military service. Some of these laws were written over 80 years ago and use terms that no longer reflect contemporary military organizational structures and ranks. SB 1500 clarifies the language in existing anti-discrimination law to update these terms, but does not change the underlying prohibition on discrimination based on military service.

SB 1501 updates a number of California's codes to remove outdated gender-specific references, conforming them to the terminology currently used by the U.S. Armed Forces. References to enlisted "men" and "women" were changed to enlisted "persons."

Sexual Harassment Educational Materials — Talent Agencies

Under AB 2338, talent agencies will need to provide their adult artists with educational materials on sexual harassment prevention, retaliation and reporting resources, as well as on nutrition and eating disorders. All materials must be provided within 90 days in a language the artist understands.

Artists who are between the ages of 14 and 17, along with their parent or legal guardian, must receive and complete training in sexual harassment prevention, retaliation and reporting resources before they are issued a work permit.

Talent agencies will be required to keep records for three years confirming that the educational materials have been made available to all artists who have been signed for representation and, as a part of their license renewal process, to confirm with the Labor Commissioner that they are providing the relevant educational materials. A penalty of $100 per violation can be assessed, unless the Labor Commissioner determines the violation was a clerical error or an inadvertent mistake.

Sexual Harassment — Professional Relationship

Under current Civil Code Section 51.9, an individual may be liable for sexual harassment that occurs in the course of a business, service or professional relationship where the client or customer cannot easily end the relationship. Examples of professionals who might be liable to their clients for sexual harassment currently include doctors, attorneys, bankers and accountants, among others. SB 224 extends the list of examples listed in the Civil Code to elected officials, lobbyists, investors, directors and producers.

In addition, it expands liability to anyone who holds himself/herself out as being able to help someone establish a business, service or professional relationship, whether with that individual or with a third party. SB 224 also eliminates the requirement to show that the relationship could not be easily terminated, ensuring that responsibility remains with the harassing party regardless of whether the other party could have walked away.

Legislative Employees — Whistleblower Protection

Two new laws were enacted to protect legislative staffers who speak out about sexual harassment and other misconduct. AB 403 protects "whistleblowers" who report legal and ethical violations by legislators and fellow legislative staffers, and prohibits retaliation against them. SB 419 strengthens protections against retaliation when legislative staffers and lobbyists report harassment, and requires the Legislature to keep harassment complaint records for at least 12 years.

Both AB 403 and SB 419 were urgency measures that took effect immediately upon being signed by Governor Brown on February 5, 2018, and September 30, 2018, respectively.

Wage and Hour

Keep in mind that on January 1, 2019, the state minimum wage increases to $11 per hour for employers with 25 or fewer employees and to $12 per hour for employers with 26 or more employees. This is not a new law — SB 3 was signed in 2016, and this is the next mandatory increase. To learn more, CalChamber members can download the 2019 Minimum Wage Hike Brings Changes for California Employers white paper (nonmember download). And remember to determine if any local minimum wage ordinances apply to your business.

In addition, a few narrow industry wage and hour carve outs were created this year, providing meal and rest break exceptions in limited circumstances and prohibiting Private Attorneys General Act (PAGA) lawsuits for most union construction employees.

Construction Industry PAGA Prohibition

Construction industry employees will be prohibited from pursuing a PAGA claim under AB 1654 if the worker is covered by a collective bargaining agreement (CBA). To qualify for the exemption, the CBA must include a grievance and binding arbitration procedure to address potential Labor Code violations. The new law will remain in effect until January 1, 2028.

The proponents' main reason for the industry carve out is that CBAs already provide protections for employees in the construction trade industry regarding legal and job site disputes, so PAGA isn't necessary. This bill will most likely start a larger trend for industry carve outs regarding PAGA.

Petroleum Facility Rest Break Exception

The recent court ruling of *Augustus v. ABM Security Services, Inc. (2016) 2 Cal.5th 257* hinders employers' ability to reach employees even in emergency situations because the court determined that employees could not be required to carry radios or other forms of communication devices during breaks.

The CalChamber-supported AB 2605 created an extremely limited exception for required rest breaks in the petroleum industry, allowing employers to require that employees holding safety-sensitive positions at petroleum facilities be on-call and carry instant communication devices during rest periods. These employees must be allowed to make up an interrupted rest break within a reasonable and prompt time if circumstances allow and, if not an option, receive an additional hour of pay at the employee's regular rate of pay.

This exception applies only at petroleum facilities covered under Wage Order 1 – Manufacturing, and took effect immediately upon being signed by Governor Brown on September 20, 2018.

Meal Period Exception for Feed Truck Drivers

An extremely limited meal period exception was created by AB 2610 to apply to certain commercial drivers who are transporting commercial feed to customers in remote, rural areas. These drivers are excluded from the obligation to provide a meal period within the required time period if the driver receives no less than one and one-half times the state minimum wage and overtime compensation when required by law. Note that this new law does not create an exception to the requirement to provide these employees with a second meal period before the end of the 10th hour of work.

Copies of Payroll Records

Existing law allows employees to "inspect or copy" their payroll records. SB 1252 merely makes clarifying changes designed to ensure that employers make and provide the copies, and don't require employees to find ways to make the copies themselves.

Workplace Health/Safety and Workers' Compensation

Two bills on very different topics — injury reporting and workplace mental health — were signed this year.

Injury Reporting — Statute of Limitations

Employers' liability for workplace injury reporting violation penalties has been extended from six months to five years under AB 2334. A change in the code's definition of an "occurrence" as it relates only to citations for recordkeeping purposes means citations may be issued for the entire five-year mandatory record retention period until they are corrected or discovered by the California Division of Occupational Safety and Health (Cal/OSHA), or until any recordkeeping duty is eliminated.

This new law is a response to the recent federal rollback of recordkeeping regulations established under the Obama administration. If Federal OSHA follows through with its current proposal to eliminate or substantially diminish electronic submission requirements for Logs 300 and 301, AB 2334 directs Cal/OSHA to create an advisory panel to consider how California employers could still be required to continue electronic submission.

Workplace Mental Health — Voluntary Standards

SB 1113 permits California's Mental Health Services Oversight and Accountability Commission to develop a voluntary standard for mental health in the workplace that's designed to provide guidance to California's employer community to support the mental health and wellness of employees. A workgroup will be convened to explore how the state can encourage employers to support mental health awareness, access to care and improved mental health outcomes, including reducing unemployment.

Liability

Two new laws related to imposing joint liability were signed this year.

Joint Liability — Port Trucking Companies

Joint liability will be imposed on client employers who hire port drayage motor carriers (trucking companies) with certain unpaid employment-related judgments, affecting businesses such as retailers, agriculture and auto dealers who rely on port truckers to transport products from ships. This is a significant expansion of current law, which can hold the client employer liable when a labor contractor's employee is performing work that is in the "usual course of the client employer's business" so that the same wage and hour protections apply to two employees performing the same work side-by-side. The CalChamber-opposed SB 1402 imposes joint liability for the client employer even when those violations don't occur at its worksite.

Port trucking companies will be placed on a Division of Labor Standards Enforcement website "blacklist" if they have an unsatisfied final judgment for taxes, various wage and hour violations, unreimbursed expenses, failure to provide workers' compensation coverage or independent contractor misclassification. A customer that uses a port trucking company on the blacklist will share all civil legal responsibility and civil liability for services obtained after the date the trucking company appeared on the list.

Labor-Related Liabilities — Direct Contractor

For certain private construction contracts, last year's AB 1701 imposed liability onto the general contractor for any unpaid wages, benefits or contributions that a subcontractor owes to a worker under the contract. It authorized the general contractor to request payroll records from subcontractors to confirm that wages are paid and other benefits or contributions are being made. This year's clean-up bill, AB 1565, removes a provision placed into the Labor Code by AB 1701 that indicated a direct contractor's liability for unpaid wages or benefits is in addition to any obligations and remedies otherwise provided by law.

It also resolves concerns on withholding disputed payments owed to a subcontractor who has not provided adequate information about its payroll records. A general contractor must provide certainty by including in the terms of the contract which documents the subcontractor will be required to produce prior to withholding payments, and subcontractors must do the same for lower-tiered subcontractors.

AB 1565 is an urgency measure that took effect upon being signed by Governor Brown on September 19, 2018.

Human Trafficking Training

Current law requires certain types of businesses to post human trafficking notices. These notices contain hotline numbers for the public and victims of human trafficking to seek help or report unlawful activity, as well as information about organizations that provide services to eliminate slavery and human trafficking. Two bills expanding on this posting notice were signed, both of which require certain employers to provide employee training on signs to look for and how to report suspected trafficking.

AB 2034 requires training for employees of intercity passenger rails, light rails and bus stations on recognizing and reporting suspected human trafficking. These employees must attend a training session of at least 20 minutes by January 1, 2021, if they might interact or come into contact with a victim of human trafficking or are likely to receive a report from another employee about suspected human trafficking.

SB 970 amends California's FEHA to require ongoing training of certain hotel and motel employees regarding identifying, responding to and reporting human trafficking by January 1, 2020. At least 20 minutes of classroom or other interactive training must be provided to any hotel or motel employee who is likely to interact or come into contact with victims of human trafficking, including those who work in a reception area, perform housekeeping duties, help customers in moving their possessions or drive customers.